

16th December 2022

Dear Jackie Baillie and Anas Sarwar

Sex Matters is a human-rights organisation campaigning for clarity on sex in law and policy across the UK. We are writing with urgent concerns about the proposed Gender Recognition Reform (Scotland) Bill in light of the opinion of Lady Haldane on the petition of For Women Scotland for judicial review issued on 13th December.

We have written previously to MSPs with our concerns about the Bill and its impact on human rights (on 25th October 2022 with regards to Article 3, 8, 9, 10, 11 and 14), and we share your concern about ensuring the law does not harm single-sex services for women.

We support the intention of your proposed amendment, which attempts to uphold Labour's 2019 manifesto pledge to "ensure that the single-sex-based exemptions contained in the Equality Act 2010 are understood and fully enforced in service provision".

However, the opinion of Lady Haldane in the Court of Session that biological sex is not currently recognised in the Equality Act as a protected characteristic but that "the meaning of sex for the purposes of the 2010 Act, 'sex' "includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex."

This judgment (which may be appealed) changes the entire legal context of the Bill, and forecloses any possibility of amending it with any certainty regarding the impact, or of voting for it with confidence that it will not harm single-sex services provided on the basis of biological sex.

The timetable to agree the Bill should be urgently revised to permit full consideration of the implications of the Haldane opinion. Otherwise, it will be impossible for legislators to protect women's single-sex services and ensure legal clarity and certainty.

Sex Matters is a human-rights organisation campaigning for clarity about sex in law, policy and language | sex-matters.org | info@sex-matters.org

Directors: Michael Biggs, Rebecca Bull, Julia Casimo, Naomi Cunningham, Maya Forstater, Emma Hilton

We are attaching an analysis of the implications of the Haldane judgment for your amendment 130, which illustrates the overall uncertainty of the legal position at this time. It demonstrates the impossible position you have been put in by being asked to amend and vote for this Bill on 20th and 21st December.

None of this is the fault of your drafting. Rather, it is a consequence of the short debating timetable for 139 amendments, this week's decision in the Court of Session, and the uncertainty regarding the cross-border acceptance of Scottish GRCs as impacting on the Equality Act 2010.

Overall, passing the GRR in any form on 21st December will create a legal mess which leaves service providers, transgender people and other service users uncertain about their rights. Legislators will also be uncertain about what it was they voted for.

We urge you to demand more time for consideration before the final vote on the bill, in order to gain certainty on the Haldane judgment and to consider its legal implications.

Yours sincerely,



Naomi Cunningham
Chair



Maya Forstater
Executive Director



Helen Joyce
Director of Advocacy

Analysis

[NB: to aid reading we have colour coded the text to show which form of words relate to **biological males** and **biological females**]

In her opinion, Lady Haldane found that biological sex is not currently recognised in the Equality Act as a protected characteristic:

“the meaning of sex for the purposes of the 2010 Act, ‘sex’ is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex.”

According to this judgment, the following meanings apply throughout the Equality Act 2010:

- **Male** – Someone who is **biologically male and does not have a GRC issued under the GRA 2004** or someone who is **biologically female and does have a GRC issued under the GRA 2004**.
- **Female** – Someone who is **biologically female and does not have a GRC issued under the GRA 2004** or someone who is **biologically male and does have a GRC issued under the GRA 2004**.

Inserting these definitions into the Equality Act 2010, we get:

- Man (S.212) – A **[biological] male of any age [without a GRC] [or a biological female of any age in possession of a GRC]**
- Woman (S. 212) – A **[biological] female of any age [without a GRC] [or a biological male of any age in possession of a GRC]**
- A reference to a person with the protected characteristic of sex (S. 11) – A reference to a **[biological male without a GRC or a biological female with a GRC]** or to a **[biological female without a GRC or a biological male with a GRC]**
- A reference to people who share a protected characteristic of sex (S. 11) – A reference to **[persons who have the sex for legal purposes in relation to this Act regardless of their biological sex]**.

These same definitions would need to be read into any amendments to the Gender Recognition Reform (Scotland) Bill (assuming that the Haldane judgment stands). There is additional uncertainty about whether the UK government will accept Scottish GRCs.

Thus, amendment 130 can be interpreted in light of Lady Haldane’s opinion as stating:

Nothing in this Act prevents the provision of a service only to persons **[who have the same sex for legal purposes in relation the Equality Act 2010]** where it is in accordance with Schedule 3 of the Equality Act 2010 (“2010 Act”).

In particular, nothing in this Act modifies the protected characteristic of gender reassignment, as defined by section 7 of the 2010 Act or the exception to the general prohibition of gender reassignment discrimination to allow the provision of separate services for persons of each sex in accordance with para 28 of Schedule 3 of that Act.

In particular, nothing in this Act modifies –

(a) the definition of “sex” in section 11 of the 2010 Act **[your biological sex for a person without a gender recognition certificate recognised by the UK government or your sex as modified by a gender recognition certificate recognised by the UK government]**

(b) the definition of “man” **[a biological male without a gender recognition certificate recognised by the UK government]** **[or a biological female with a gender recognition certificate recognised by the UK government]** or “woman” **[a biological female without a gender recognition certificate recognised by the UK government]** **[or a biological male with a gender recognition certificate recognised by the UK government]** in section 212(1) of the 2010 Act.

The impact of this amendment will be different in each of the four potential scenarios in which this legislation might be implemented – whether or not the Haldane judgment survives any potential legal challenge, and whether or not the UK government accepts Scottish GRCs as equivalent to those issued under the Gender Recognition Act 2004 (or incorporates them into the “overseas track”).

According to our analysis, the amendment would be irrelevant in three of these circumstances and would fail to achieve its objective in the fourth.

Scenario analysis: Would the amendment protect single-sex spaces on the basis of biological sex?

	Haldane judgment is upheld	Haldane judgment is overturned
UK government accepts Scottish GRCs	No , because single-sex services are defined as for people with the same sex for legal purposes in relation the Equality Act 2010.	Amendment may be irrelevant if biological sex is recognised as a protected characteristic.
UK Government does not accept Scottish GRC	Amendment would be irrelevant , as Scottish GRCs would not apply to the Equality Act.	Amendment would be irrelevant , as Scottish GRCs would not apply to the Equality Act.